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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 768

LOCAL UNION NO. 229, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

—v.—

AFFILIATED FOOD DISTRIBUTORS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Dated: January 26, 1974

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Question Presented

Did the United States Court of Appeals for the Third Circuit properly apply the holdings of this Court in interpreting the arbitration clause in the instant matter?

Statement of the Case

Affiliated Food Distributors, Inc. (hereinafter "Respondent") and Local Union No. 229 (hereinafter "Petitioner"), at all times relevant herein, were parties to a Collective Bargaining Agreement executed on May 3, 1969. From

November 1, 1971, to November 3, 1971, an illegal strike occurred in violation of the parties' "no-strike" agreement. On November 18, 1971, Respondent commenced a breach of contract action in the United States District Court of Pennsylvania, for damages, pursuant to Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 185(a).

The Petitioner moved the District Court to dismiss or, in the alternative, to stay Respondent's action for damages pending arbitration, alleging that the question of damages resulting from a violation of the no-strike provision of the Collective Bargaining Agreement was arbitrable.

On July 10, 1972, the District Court for the Middle District of Pennsylvania granted Petitioner's motion to stay. On appeal, the United States Circuit Court for the Third Circuit vacated the stay and remanded the case for further proceedings in the District Court. The Circuit Court held that the question of damages resulting from a violation of the no-strike provision of the Collective Bargaining Agreement was not arbitrable.

Petitioner now petitions for a Writ of Certiorari. This Brief is submitted in opposition to that Petition.

Argument

Respondent contends that, under the parties' Collective Bargaining Agreement, it has no obligation to refer to arbitration its claim against Petitioner for damages sustained as a result of an illegal strike. The Circuit Court held that the arbitration clause provides for arbitration only of employee grievances and not those of the Employer; that the language of the arbitration clause after analysis is clear and is not susceptible to an interpretation that covers the asserted dispute. Accordingly, there is no conflict between

the holding of the Court below and of the holding of this Court in *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960).

POINT I

The Obligation To Submit An Issue To Arbitration Is "Wholly Contractual."

A. *The Courts Must Determine Arbitrability On The Basis Of the Contract.*

An Employer may not properly be compelled to submit an issue to arbitration unless he has contractually agreed to such a forum. In *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), this Court stated:

> "Under our decisions, whether or not the Company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court *on the basis of the contract* entered into by the parties . . . arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (Emphasis added).

In *Boeing Company* v. *International Union*, 370 F.2d 969, 970 (3rd Cir. 1967), the Third Circuit Court of Appeals stated:

> "The only question for decison is whether the issues of the instant litigation were referable to arbitration. *Since the obligation to submit a controversy to arbitration is wholly contractual, the answer depends upon the proper interpretation of the relevant provisions of the collective bargaining agreement.*" (Emphasis added).

Similarly, the Fifth Circuit Court of Appeals recently stated in *Firestone Tire and Rubber Co.* v. *Rubber Workers,* 476 F.2d 603, 605 (5th Cir. 1973), that:

> "The basis of arbitration is . . . contractual and unless the parties have provided for arbitration in the collective bargaining agreement, the court is powerless to compel arbitration."

It is submitted that an examination of the instant contract establishes that the parties never intended that Employer grievances were to be resolved under the grievance and arbitration machinery.

B. *The Federal Policy Favoring Arbitration And This Court's Acknowledgment That A Collective Bargaining Agreement Is Not An Ordinary Contract Do Not Require The Courts To Eschew Traditional Principles Of Contract Interpretation In Determining Arbitrability.*

Petitioner frames the issue in the instant case as follows:

> "Do the strong federal policy favoring arbitration of collective bargaining agreement disputes and this Court's acknowledgment that a collective bargaining agreement is not an ordinary contract require the courts to eschew traditional principles of contract interpretation in favor of more liberal rules for interpreting collective bargaining agreements in determining whether an employer is bound to submit to arbitration its claim for damage arising from a union's alleged breach of a contractual no-strike provision?" [1]

[1] Petitioner apparently adopts the eschewal theory from the dissenting opinion in the Court below:

> "Rules of contract construction applicable in a normal commercial context are to be *eschewed* in the interpretation of the arbitration clause of a collective bargaining agreement.'" 483 F.2d 418, 422 (footnote omitted) (Emphasis added).

Petitioner alleges that the instant Writ should be granted because:

> "This case presents the issue of a developing trend by lower courts repudiating the admonitions and guidelines of *Warrior and Gulf* in their reliance on traditional principles of contract interpretation in determining the arbitrability of an employer's claim on a union's alleged breach of contractual no-strike provision." Petition in Support of Writ, p. 5.

The Respondent submits that *Warrior and Gulf* does not support Petitioner's novel eschewal theory, nor have the lower Courts fail to heed the admonitions and guidelines of that case.

In *Warrior and Gulf*, this Court did not suggest that the Courts were to shun traditional principles of contract interpretation in determining whether a particular grievance was intended by the parties to be within the ambit of the grievance-arbitration machinery. Neither does *Wiley* v. *Livingston*, 376 U.S. 543 (1964), suggest such a negation.[2]

Respondent submits that this Court's statement that a collective bargaining agreement is not an ordinary contract recognizes only that an arbitrator may take cognizance of extra contractual industrial realities present in deciding the merits of a grievance. This Court's recognition of a collective bargaining agreement as encompassing something more than other contracts was never intended to restrict Courts in the application of traditional contract principles in determining arbitrability.

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[2] In *Wiley* v. *Livingston*, this Court was not presented with the interpretation of the specific terms of a Collective Bargaining Agreement. Rather, it was presented with determining whether Federal policy required that an entire arbitration clause should be held as operative against a successor Employer following a merger.

POINT II

The Circuit Court Properly Determined That The Collective Bargaining Agreement In the Instant Case Does Not Provide For Arbitration Of The Respondent's Grievances.

A. *The Arbitration Clause.*

The arbitration clause in the parties' Collective Bargaining Agreement states:

"Article XXIII—Arbitration

Any difference, grievance, or dispute between the Company and the Union arising out of, or relating to this Agreement, or its interpretation or application, or the enforcement thereof, except as otherwise specifically provided herein, shall be subject to the following procedure:

A. Any grievance which arises may be taken up by the Union Steward(s) with a representative of the department involved, or with an official of the Company. Grievances must be presented in writing.

B. In the event that the grievance shall not have been resolved within three (3) working days, the Business Representative of the Union shall take the subject matter up with the Employer. If the Business Representative of the Union and the Employer cannot reach a satisfactory agreement within three (3) working days, the subject matter shall be referred to arbitration immediately. The arbitrator may be selected by mutual agreement between the Company and the Union. If no agreement is reached on the selection of the arbitrator within five (5) days, the arbitrator shall be selected from a panel of the American Arbitration Association.

> It is to be clearly understood that the Arbitrator shall not have the power to alter any of the terms of the Agreement. Decisions of the Arbitration Board shall be final and binding on both parties. Pending the decision of the Arbitration Board, the Union will not permit any strikes or interference with the regular routine of business. The cost of the arbitrator shall be borne equally by the parties to this Agreement." 483 F.2d at pp. 419-420.

This Article provides for arbitration as the third step in a procedure for the resolution of "any grievance which arises." The first two steps being (1) the Union Steward(s) taking up the grievance with a representative of the department involved or with an official of the Company and (2) if the grievance is not resolved within three working days the Business Representative of the Union taking it up with the Employer. Although the opening paragraph is seemingly broad, it does not provide that "any difference, grievance, or dispute" shall be referred to arbitration. But rather, it provides that "any difference, grievance, or dispute . . . shall be subject to the following procedure."

The procedure that follows, in paragraphs A and B, confines arbitrability solely to an employee grievance, and such a grievance can be referred to arbitration only if it has passed unresolved through the first two steps of the grievance procedure. Since paragraph A says "any grievance which arises *may be taken up by the Union Steward(s)* with a representative of the department involved, or with an official of the Company," while paragraph B provides that "the *Business Representative of the Union shall take the subject matter up with the Employer,*" the type of grievance contemplated in the grievance procedure is clearly an employee grievance. (Emphasis added.)

In short, the Collective Bargaining Agreement in the instant case provides for arbitration of only employee grievances; nowhere does it provide for arbitration of Employer grievances. Indeed, there is no mechanism in the grievance procedure which would permit the Employer to initiate grievances.

B. *The Circuit Court Properly Held That The Respondent Is Not Obligated To Arbitrate Its Claim For Damages Since The Contract Limits Arbitration To Employee Grievances.*

This Court has held that an Employer's action for damages under Section 301 of the Labor Management Relations Act for a Union's breach of a no-strike provision may not be stayed where the collective bargaining agreement limits arbitration to employee grievances. *Atkinson, supra.*

In the instant matter, the Third Circuit Court of Appeals analyzed the arbitration clause herein as follows:

> "Article XXIII does not state that 'any difference, grievance or dispute . . . arising out of, or relating to this agreement, or its interpretation or application or the enforcement thereof' shall be the subject of arbitration. Rather it provides that any such difference, grievance or dispute 'shall be subject to the following procedure.' The procedure that follows, as articulated in paragraph A and B, can fairly be read only as applying to employee grievances. 483 F.2d at p. 420
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> • • •
>
> Initially, any grievance 'may be taken up by the Union Steward(s) with a representative of the department involved, or with an official of the Company.' At the second stage, 'the Business Representative of the Union shall take the subject matter up with the Employer.' Thus, at both stages the initiative is with the Union. *It would be a strained construction at best which would*

> *attribute to the parties the thought that a company official would refer an employer's grievance to a union steward who would, in turn, refer the grievance to 'a representative of the department involved' or to 'an official of the company.'"* 483 F.2d at p. 421 (Emphasis added).

On the basis of the above analysis, the Court correctly concluded that:

> "In short, we think it may be said that positive assurance, as in *Atkinson*, that the arbitration clause of this collective bargaining agreement is not susceptible of a fair construction that the parties bound themselves to arbitrate employer grievances of the kind here involved. (Citation omitted). 483 F.2d at 421[3]

[3] Moreover, it should be noted that the last paragraph of the above quoted arbitration clause provides that "pending the decision of the Arbitration Board, the Union will not permit any strikes or interference with the regular routine of business. There is, on the other hand, no provision imposing a corresponding obligation on the Employer, for instance, to refrain from lockouts. This is further evidence that the parties to the Collective Bargaining Agreement envisioned only the employees as being the potential aggrieved party and only employee grievances as referrable to arbitration.

POINT III

The Circuit Court Properly Interpreted Federal Law.

A. *Petitioner Improperly Interprets Warrior and Gulf.*

Petitioner contends that the rules established by this Court to effectuate the congressional policy favoring arbitration require arbitration unless the arbitration clause specifically includes or excludes a specific grievance:

> ". . . rules and presumptions obviously come into play only in the more difficult cases where the arbitration provisions lack the exclusion or inclusion type of language found in *Atkinson* and *Drake*, respectively. This is precisely the type of case for which this Court established liberal rules of construction where doubts should be resolved in favor of coverage. *Warrior and Gulf, supra.*" Petition in Support of Writ, p. 7

This Court, in *Warrior and Gulf*, held that an order to arbitrate would not be denied unless it could be said with positive assurance that the clause is not susceptible to an interpretation of arbitral coverage.[4] Positive assurance can be established by forceful evidence of a purpose to exclude.[5] Petitioner's theory overlooks this Court's holding that forceful evidence of an intent to exclude can be determined only after interpreting the arbitration clause.[6]

Respondent submits that this Court mandated that Courts must interpret the arbitration clause when an ambiguity exists, to determine the parties' intent. This interpretation requires the application of traditional contract principles.

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[4] 363 U.S. at p. 582.

[5] 363 U.S. at p. 585.

[6] 363 U.S. at 584-585.

If the interpretation discloses an intent to exclude certain grievances, forceful evidence is present and arbitration is properly denied. This Court did not hold in *Warrior and Gulf* that an order to arbitrate should be granted unless the specific grievance is excluded from coverage in language that specifically states that the specific grievance is excluded.

Petitioner's interpretation of *Warrior and Gulf* would effectively remove from Courts the determination of the contractual obligation to the parties. It would limit Courts to a rigid reading of the specific exclusions and inclusions of the arbitration clause. This mechanical process would prevent Courts from assessing the fair intent of the parties as expressed in the words of the contract.[7]

In *Warrior and Gulf,* the Court stated:

> "The Congress, however, has by §301 of the Labor Management Regulations Act, assigned to the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, *the judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator*

[7] The dissenting opinion below demonstrates the abandonment of the Court's obligation to interpret the contract through the mechanical application of the Federal policy favoring arbitration:

> "While the majority's interpretation might be the better one were ordinary rules of contractual construction applicable, the teachings of *Warrior and Gulf* require that *if an ambiguity exists . . . the clause must be interpreted to remit the parties to arbitration.*" Petition in Support of Writ, p. 17. (Emphasis added).

power to make the award he made." 363 U.S. at p. 582 (Emphasis added).

The Court below, whose decision was based on its inquiry into the intent of the parties, properly applied the applicable law.

Petitioner's interpretation of *Warrior and Gulf*, which would reduce the Courts' responsibility in assessing the intent of contracting parties to a search for magic words, misinterprets the applicable law. Such an interpretation is clearly contrary to this Court's holding in *Atkinson.*

B. *The Courts Are Required To Interpret The Arbitration Provision To Determine Whether An Issue Is Arbitrable.*

Decisions of this Court establish that Courts have the responsibility to interpret an arbitration clause to determine whether a union and employer have agreed to arbitrate a given issue. *Atkinson, supra.* at p. 241.

The reason for requiring Courts to determine the issue is clear. As this Court stated in *Wiley* v. *Livingston, supra.*, at p. 547:

"The duty to arbitrate being of contractual origin, *a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does not in fact create such a duty* . . . an employer has no obligation to arbitrate issues which it has not agreed to arbitrate . . ." (Emphasis added).

C. *The Mandate of Warrior and Gulf Should Not Be Mechanically Applied Where The Contract Limits Arbitration, Either Explicitly Or Implicitly, To Employee Grievances.*

Warrior and Gulf enunciates a mandate for the liberal interpretation of arbitration clauses:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an *interpretation* that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 582-583 (Emphasis added).[8]

However, that mandate should not be applied mechanically. An Employer should not be bound to submit to arbitration its claim for damages for breach of contract where the contract limits arbitration, either explicitly or implicitly, to employee grievances. The Fifth Circuit Court of Appeals stated in *Firestone Tire and Rubber Co., supra*:

> "Numerous cases have held that breaches of a no-strike clause are not subject to arbitration where (1) the grievance provision of the agreement neither explicitly nor implicitly provide for such arbitration, and (2) the contractual grievance machinery is wholly employee oriented. E.g., Atkinson v. Sinclair Refining Co., 1962, 370 U.S. 238, 82 S. Ct. 1318. 8 L. Ed.2d 462,

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[8] It is noteworthy that the District Court herein refused to interpret the instant arbitration clause:

> "Article XXIII of the Collective Bargaining Agreement is on its face vague and uncertain. Whether this uncertainty is intentional or simply the result of poor draftsmanship need not concern us. However, *when faced with the task of interpreting such a clause, we are of the opinion that the court should simply resolve all doubts in favor of arbitration rather than strain to construe its language to conclude that it can ascertain the true intent of the parties.*" Petition in Support of Writ, Appendix B, pp. 22-23 (Emphasis added).

50 LRRM 2433; G.T. Schjeldahl Co., Packing Machinery Division v. Local 1680, IAM, 1 Cir. 1968, 393 F.2d 502, 67 LRRM 3042; Boeing Co. v. International Union, 3 Cir. 1967, 370 F.2d 969, 64 LRRM 2203." 476 U.S. at p. 605.

In the instant matter, the Circuit Court, after determining that the contract, fairly read as a whole, was not susceptible of a construction that the parties bound themselves to arbitrate the dispute before the Court, concluded that positive assurance, as required by *Warrior and Gulf*, was present:

"The principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties. (Citations omitted). When a contract, fairly read with these principles in mind, is susceptible of a construction that dictates arbitration, the congressional policy favoring that form of dispute resolution may require the denial of judicial relief despite the possibility of fairly reading the contract to evidence a contrary intent. (Citations omitted). But, there is no occasion to resort to this congressional policy in a case where *the contract, fairly read as a whole, is not susceptible of a construction that the parties bound themselves to arbitrate the dispute before the court. We conclude that this is such a case.*" 483 F.2d at p. 420 (Emphasis added).

Its application of this Court's mandate was proper.

CONCLUSION

Respondent submits that the Circuit Court below followed *Warrior and Gulf* in all respects. It found that the contract was not susceptible to an interpretation that Employer grievances were covered by the arbitration clause. Consequently, the positive assurance that the specific grievance was not covered, required by *Warrior and Gulf* before a motion to submit to arbitration may be denied, was present.

Petitioner's contention that the Court below strayed from the teachings of *Warrior and Gulf* is erroneous. The Court below properly applied those teachings. The Writ should be denied.

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